

By JEAN M. LAWLER AND KENNETH E. GOATES



# NO ASSURANCES

## Insurance coverage for the events of September 11 will hinge upon the interpretation of often ambiguous policy language

**O**n September 11, 2001, the world saw two planes crash into two different buildings at New York's World Trade Center some 16 minutes apart, igniting two separate fires and ultimately resulting in the collapse of each of those buildings and causing damage to other buildings in the vicinity. The world also learned of a plane crashing into a field in Pennsylvania and saw another plane crash into the Pentagon. Four planes had been hijacked, belonging to two different airlines leaving three different airports with two cities as their destinations. The destruction of the WTC and its continuing aftermath was transmitted globally, live

and nonstop, via television and other media, for the whole world to see.

The collapse of the WTC towers created reverberations both near and far. Not only were businesses near ground zero affected but businesses throughout the country felt the effects of the collapse, with many suffering losses resulting from the interruption of business operations and the imposition of civil authority.

What exactly did the world see that day? Was the loss at the WTC towers, and the resulting damage, attributable directly or indirectly to one series of similar causes? Or was the loss and damage at each tower attributable to two separate and dissimilar causes? Can an event be one thing to the general public and another thing for insurance purposes? And

does the distinction make a difference? What insurance is applicable to these losses? What rights, duties, and obligations do the insurers of the affected properties and persons have to their policyholders? The answers lie in how the applicable insurance contracts are phrased, interpreted, and applied.

The property insurance claims and suits that have emanated from the events of September 11 vary in scope. For claims and

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suits involving the WTC, parties have raised issues regarding whether the WTC towers must be rebuilt before policy benefits are payable, or whether monies can be paid as expenses are incurred. Other suits have sought to adjudicate whether New York courts have jurisdiction over Bermuda insurers and whether arbitration in London could be enforced.<sup>1</sup>

Several of the WTC suits involve “occurrence” issues under contracts of insurance that were either not issued or not fully negotiated as of September 11.<sup>2</sup> These, in particular, have captured the imagination of the legal and insurance communities with the intellectual aspects of the contractual issues presented.

There are claims arising from damaged buildings in the vicinity of the WTC. Mold in ventilation systems of damaged buildings, having been opened to the elements, is a concern. Business owners just outside the designated WTC prohibited zones in lower Manhattan worry about how they can keep their doors open, while businesses just across the street and inside a prohibited zone may still be unable to open.<sup>3</sup> Hotels located in far-ranging locations, such as Louisiana, have filed suit or are reported to have submitted claims for business interruption losses.<sup>4</sup> Billions of dollars are at stake.

## One Occurrence or Two

In October 2001, the first WTC insurance coverage action was filed in the U.S. District Court for the Southern District of New York.<sup>5</sup> Other suits involving the WTC property and its insurers followed soon thereafter in the same court.<sup>6</sup> These cases have been consol-

idated and are being handled by the same judge. The trial date has been set for November 15, 2002.

To understand the complexity of the insurance issues in these lawsuits, it is necessary to examine the scope and nature of the insurance program that was being negotiated for the WTC properties as of September 11. In court proceedings, the WTC has been described as “a complex of seven commercial buildings. The Port Authority owns Buildings 1 through 6 and the underlying land, the retail mall underneath the complex, and the ground beneath Building 7.”<sup>7</sup> The Port Authority of New York and New Jersey entered into a 99-year lease with various entities controlled by Larry Silverstein on or about July 16, 2001.<sup>8</sup> The entities that leased the WTC properties from the Port Authority are referred to by the court as the Silverstein Parties.

The WTC property insurance program involves more than 20 insurance companies collectively providing \$3.5468 billion in per occurrence limits, with a primary level of \$10 million per occurrence and 11 excess layers.<sup>9</sup> Despite a projection that \$5.05 billion in insurance would be necessary “both to replace the buildings and cover the group’s rental income losses in the event of a catastrophic loss,” the insurers contend that the “lessees instead bought insurance almost sufficient to rebuild without regard to any possible loss of rental income.”<sup>10</sup> Nonetheless, according to the Silverstein Parties, this was the largest property insurance program ever issued on a single real estate complex, and the Silverstein Parties’ broker, Willis Limited, has been said to have “canvassed the world’s

insurance markets to place first party property coverage for their leasehold.”<sup>11</sup>

Primary policies for the property coverage provided by The Travelers Indemnity Company were initially issued on or about September 14, 2001.<sup>12</sup> SR International Business Insurance Co., Ltd.—referred to as Swiss Re—is an excess insurer participating in the WTC insurance program. Swiss Re agreed “based upon the terms of signed placing slips...to underwrite 22% of the lessee’s coverage, excess of the primary \$10 million layer.”<sup>13</sup>

Swiss Re claims that in June 2001, its underwriters received an underwriting submission and placing slip from Willis.<sup>14</sup> It contends that the underwriting submission contained the proposal of coverages, terms, and conditions for the Silverstein Parties’ interests as lessees of the WTC and that the placing slip, which identified the terms of the coverages that Silverstein was seeking, was submitted with a proposed policy form, the “WilProp form.”<sup>15</sup>

The proposed WilProp form included an “occurrence” definition providing that losses attributable to any cause or series of causes would be subject to a single occurrence limit.<sup>16</sup> Specifically, the proposed occurrence language in the WilProp form provided:

Occurrence shall mean all losses or damages that are attributable directly or indirectly to one cause or one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur.<sup>17</sup>

Travelers agreed to participate in the primary level of insurance and in various excess levels, conditioning its willingness to do so upon it being the lead underwriter using its own form of policy for property insurance—“the Travelers’ form”—rather than the WilProp form.<sup>18</sup> Nonetheless, Travelers asserts that the WilProp form was the basis not only for its decision to issue its policy but also for the language in the deductible portion of its policy. Therefore Travelers, like the other insurers, is arguing that the attack on the WTC constitutes only one occurrence due to policy language, New York law, and the intentions of the parties as evidenced by the WilProp form.

As the representative of the Silverstein Parties, Willis is alleged to have accepted the Travelers’ position as the lead underwriter and to have adopted the Travelers’ form as the form policy, subject to some further modifications reflecting exposures unique to the WTC.<sup>19</sup> In this regard, the Silverstein Parties contend that “once the

## What’s in a Word

**U**.S. District Judge John S. Martin Jr., in his Opinion and Order denying the Silverstein Parties motion for summary judgment in *World Trade Center Properties v. Travelers Indemnity Company*,<sup>1</sup> asked, “Is the term ‘occurrence’ ambiguous?” The judge continued, “As Justice Holmes noted more than 80 years ago, ‘A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.’” The judge also supplied his own answer: “The history of litigation over the meaning of the term ‘occurrence’ amply demonstrates that its meaning is far from unambiguous and must be divined from the particular context in which it is used.”

Earlier in his opinion, the judge noted, “Several hundred years ago, Lord Chief Justice Coke observed that truth is ‘the mother of justice.’” Judge Martin continued, “Our system of justice is founded on the principle that litigation is to be a search for the truth; it is not some type of intellectual game that is circumscribed by the inflexible rules that define it.” The judge’s conclusion was unambiguous. “While the Court is not unmindful of the Silverstein Parties’ interest in obtaining a prompt decision concerning the amount of money the insurers will have to contribute to the rebuilding of the World Trade Center, that interest cannot outweigh the interest of justice in insuring that the true extent of that liability is fairly and accurately determined.”—**J.M.L. & K.E.G.**

<sup>1</sup> World Trade Ctr. Props. v. The Travelers Indem. Co., 01 CV 12738 (S.D. N.Y., filed Dec. 28, 2001), Opinion & Order Denying Plaintiffs’ Motion for Summary Judgment (June 3, 2002).

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lead underwriter has been designated, it is customary that the co-insurers and excess insurers will 'follow the form' of the lead underwriter with respect to the terms of their own coverage."<sup>20</sup>

The Silverstein Parties have taken the position that because the Travelers' form contained no special or expanded definition of "occurrence," it therefore left the term to be interpreted and applied in accordance with New York law. The Silverstein Parties contend, "Under New York law, absent any language to the contrary, an 'occurrence' is defined as the immediate unfortunate event resulting in a loss—and not any more remote cause, plot or scheme that may lie behind or bring about the immediate cause."<sup>21</sup>

Swiss Re filed the initial coverage action, naming World Trade Center Properties, various Silverstein and Westfield entities, the Port Authority of New York and New Jersey, and others with property interests in the WTC buildings as defendants, seeking a declaration of rights and duties of the parties to the Swiss Re share of the insurance program.<sup>22</sup> There is no issue about whether there was in fact an agreement to provide insurance. Swiss Re specifically acknowledges in its complaint that "Swiss Re is prepared to honor its insurance obligations following the September 11 attack based upon insurance policy language provided by Mr. Silverstein's representatives [Willis] at the time Swiss Re agreed to underwrite the property insurance for the World Trade Center."<sup>23</sup> However, because "there is insufficient insurance to both rebuild the World Trade Center and to fund years of rent interruption" and "the potential payment to the Silverstein group for years of lost rental income could erode coverage to which other insureds under the policy are entitled for purposes of rebuilding," Swiss Re requests a declaration of rights.<sup>24</sup>

The primary question that the court has been asked to address in connection with these coverage actions is whether the property damage at the WTC resulted from one occurrence or two. The answer to this question will resolve the issue of the amount that the Silverstein Parties are entitled to recover from its property insurers—that is, will their recovery consist of the maximum amount for one occurrence or two.

Swiss Re, Travelers, and the other insurers have asserted that in accord with the provisions of the WilProp form, the intent of the parties dictate that the September 11 loss at the WTC is the result of one occurrence, so only the one occurrence limit of \$3.5468 billion is applicable. Swiss Re contends that it and Willis had exchanged a revised placing slip that incorporated various Swiss Re modifications to the proposed WilProp terms,

making Swiss Re's agreement to the terms of the insurance coverage a condition of its obligation to the insured.<sup>25</sup> In particular, Swiss Re asserts that as of September 11, "Willis...had represented to Swiss Re in its underwriting submission that [the WilProp language] would be the starting point for any Swiss Re policy."<sup>26</sup>

The Silverstein Parties, on the other hand, have taken the position that their interpretation of New York law on the meaning of "occurrence," and their insistence that the lack of an "occurrence" definition in the Travelers policy should apply to the other policies, must result in a determination that there were two occurrences and thus the limits for two occurrences (approximately \$7.1 billion) should be available to the Silverstein Parties in connection with their loss.

This issue of one occurrence or two is not a simple matter of how many planes hit how many buildings and started how many fires. The answer lies in whether the court finds the WilProp form to be the basis for all the policies, including the Travelers policy, and if so, how the court then applies the wording of the form. Simply stated, this issue as to the number of occurrences is contractually driven. To be resolved by the application of New York law, evidence regarding underwriting negotiations and expectations of the parties regarding the terms and conditions of the insurance contracts has been held relevant to the determination of whether the WilProp form should be applied or if there is some other definition of "occurrence" that might be more reasonably applied. Once it has been determined what specific policy language was negotiated and/or intended, the focus will move to applying the facts of the loss to the particular language adjudged to be part of each particular insurance contract. (It should be noted that in other suits, the Silverstein Parties are reported to have reached settlements and agreed that only one occurrence payment is due.<sup>27</sup>)

This process invokes the universal threshold question regarding contract disputes: How is the contract to be interpreted? New York is a state that adheres to the general rule that "courts will not look behind the plain meaning of the words of a contract, no matter how strong the extrinsic evidence that the parties intended something other than that which is indicated by their words."<sup>28</sup> However, "if the contract language is ambiguous, then the courts should look to extrinsic evidence to determine the true intent of the parties."<sup>29</sup> Further, "[a] term is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and

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# MCLE Test No. 108

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1. How many buildings comprise the World Trade Center?
  - A. 2.
  - B. 7.
  - C. 6.
  - D. 10.
2. Who owns the World Trade Center?
  - A. The Silverstein Partners.
  - B. The Port Authority of New York and New Jersey.
  - C. The city of New York.
  - D. Citibank.
3. What is the amount of the primary level of insurance for the World Trade Center property insurance program?
  - A. \$1 million.
  - B. \$2 million.
  - C. \$5 million.
  - D. \$10 million.
4. What are the limits per occurrence for the World Trade Center property insurance program?
  - A. \$1.555 billion.
  - B. \$3.5468 billion.
  - C. \$4.023 billion.
  - D. \$5.05 billion.
5. What is at issue in the World Trade Center occurrence coverage actions?
  - A. The WilProp form.
  - B. The Travelers policy.
  - C. A and B.
  - D. None of the above.



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1.  A  B  C  D
2.  A  B  C  D
3.  A  B  C  D
4.  A  B  C  D
5.  A  B  C  D
6.  Yes  No
7.  A  B  C  D
8.  True  False
9.  True  False
10.  A  B  C  D
11.  Yes  No
12.  A  B  C  D
13.  A  B  C  D
14.  A  B  C  D
15.  A  B  C  D
16.  A  B  C  D
17.  Yes  No
18.  A  B  C  D
19.  A  B  C  D
20.  True  False

6. Has the U.S. District Court for the Southern District of New York found the term "occurrence" ambiguous?  
Yes.  
No.
7. How does a court determine the meaning of a term that is not defined in the policy?  
A. The court consults a dictionary and legal authorities.  
B. The court examines the mutual intent of the parties.  
C. Prayer.  
D. A and B.
8. In a typical business interruption policy, there must be direct physical loss to covered property.  
True.  
False.
9. In a typical business interruption policy, the cause of loss or damage must be a covered cause of loss.  
True.  
False.
10. How far from the described premises can a vehicle be located for the loss of personal property within the vehicle to be covered by a business interruption policy?  
A. 10 feet.  
B. 50 feet.  
C. 75 feet.  
D. 100 feet.
11. Under a typical business interruption policy, will damage at a remote, unrelated site trigger business interruption coverage?  
Yes.  
No.
12. What type of insurance may provide coverage for business interruption when there is damage at a remote location?  
A. The Wilprop form.  
B. The Travelers policy.  
C. Contingent business interruption.  
D. An all-risk policy.
13. What must be prevented in order for civil authority coverage to apply?  
A. Access to the described premises.  
B. Access to the neighbor's premises.  
C. Access to police.  
D. Access to the fire station.
14. Who or what must prevent access to the designated premises in order for civil authority coverage to apply?  
A. The insured.  
B. Civil authority.  
C. Tenants.  
D. Lawyers.

15. In order for the typical business interruption coverage to apply, there must be:  
A. Actual loss of income.  
B. Suspension of operations.  
C. Damages to covered property.  
D. All of the above.
16. What is the primary issue regarding civil authority coverage before the court in *730 Bienville Partners v. Assurance Company of America*?  
A. Physical damage to covered property.  
B. Liability of the airlines.  
C. The reasonableness of the airport shutdown order.  
D. All of the above.
17. Was there a civil authority order in effect near ground zero, with prohibited or restricted access zones?  
Yes.  
No.
18. When does business interruption coverage end?  
A. When the "period of restoration" ends.  
B. When the national state of emergency is declared over.  
C. When the local government makes a decision that the interruption of business is over.  
D. All of the above.
19. When does extra expense and civil authority coverage begin?  
A. Upon the action taken by the civil authority in prohibiting access to the described premises.  
B. On the date of direct physical loss.  
C. 72 hours after the civil authority prohibits access to the described premises.  
D. None of the above.
20. Extra expense and civil authority coverage ends 1) three consecutive weeks after the civil authority prohibits access to the described premises, or 2) when the insured's business income coverage ends; whichever is later.  
True.  
False.

who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.”<sup>30</sup>

With this as the threshold, on June 3, 2002, in the first substantive legal opinion to emanate from the consolidated WTC cases, the trial judge in *World Trade Center Properties v. The Travelers Indemnity Company* found the term “occurrence” to be ambiguous. His ruling applies to each of the occurrence-related WTC cases. (See “What’s in a Word,” page 40.) Thus the interpretation and application of the insurance contracts at issue will be made after consideration of extrinsic evidence:

In sum, none of the relevant cases compels a finding that the term “occurrence” has such an unambiguous meaning that, in its search for truth, justice should blind itself to the wealth of extrinsic evidence concerning the parties’ intentions that is available in this case. This includes the specific definition of the term “occurrence” circulated by the insurance agent for the Silverstein Parties, testimony and documents relating to the negotiations prior to September 11th and the overall structure of the insurance program from the WTC, and testimony and documentary evidence concerning statements made after September 11th by those who had been involved in negotiating the insurance contracts, in which they expressed their views on the question of whether there had been one or two occurrences.<sup>31</sup>

The judge’s opinion is similar to California authority on this issue, albeit from a slightly different perspective. For example, in a case involving the number of occurrences to be applied under a property policy in a situation involving 653 thefts of diesel fuel from a pumping facility by tanker truck drivers over an 11-month period, a California appellate court grappled with “what meaning is to be given the undefined term ‘occurrence’, and could these thefts constitute only one occurrence so as to require application of a single deductible rather than one for each of the six hundred fifty-three thefts?”<sup>32</sup>

The California court, like the *Travelers* court, first approached the threshold question of contract interpretation before moving to the question of whether the undefined term “occurrence” was ambiguous:

The principles which govern the interpretation of insurance contracts are both familiar and well settled. Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code § 1636.)

Such intent is to be inferred, if possible, solely from the written provisions of the contract. The “clear and explicit” meaning of these provisions, interpreted in their “ordinary and popular sense,” unless “used by the parties in a technical sense or a special meaning is given to them by usage” (*Civil Code* § 1644) controls judicial interpretation. (*Civil Code* § 1638.)...This reliance on common understanding of language is bedrock. Equally important are the requirements of reasonableness and context. An insurance policy provision is ambiguous when it is capable of two or more constructions both of which are reasonable...[L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case....<sup>33</sup>

After referring to dictionary definitions of “occurrence” and the manner in which the term is defined in liability policies, the court determined that the question of whether “occurrence” was an ambiguous term could not be resolved by reference to the ordinary and everyday usage of the word. The court thus concluded:

[W]e must interpret the term “occurrence” in context, with regard to its intended function in the policy. As used in the policy, the term “occurrence” reasonably contemplates that multiple claims could, in at least some circumstances, be treated as a single occurrence or loss. It appears reasonable to us that the term “occurrence” as used in the deductible clause is effectively referring to a loss. In our view...multiple claims, all due to the same cause or a related cause, would be considered a single loss....<sup>34</sup>

The matter was reversed and remanded to the trial court for a determination as to whether there was “an organized and systematic scheme [regarding] its diesel fuel products.” The court held that if such a scheme were to be established, the thefts would be treated as one single occurrence.

In considering this question of whether a series of acts constituted a single occurrence or multiple occurrences, the California court looked to the cause of the loss, with a particular focus on the ruling in a factually similar Third Circuit case.<sup>35</sup> In that case, the trial court had held that thefts “constituted one occurrence because they were part of a single continuous scheme,” determining “that each theft was a part of a larger scheme...and that the scheme to steal was the proximate cause of each theft.”<sup>36</sup> In reaching its decision, the California court stated:

Courts, both in California and across

the country, have reached a similar conclusion when faced with a fact situation involving a series of related acts which can be attributed to a single cause; and the same principle is applied whether the coverage involves property, liability or fidelity insurance.<sup>37</sup>

By contrast, the Ninth Circuit, in an unpublished opinion decided September 11, 2001, determined that arson fires at four different county courthouses, set by the same individual, were four separate occurrences, with the seeming distinction being whether or not there had been a concerted plan of action.<sup>38</sup>

These are the same questions facing the New York court in the WTC cases. By ruling in *Travelers* that the term “occurrence” was ambiguous, and in denying summary judgment for the Silverstein Parties, the court has set the stage for the factual issues to be developed, from which it can then determine the intent of the parties as it interprets and applies the insurance contracts at issue. Assuming that the language in the WilProp form is applied to the loss, it would appear that a reasonable reading of the “occurrence” definition and the factual information developed since September 11 could dictate the finding of one occurrence rather than two.

## Business Interruption

Among the other September 11 insurance claims, claims of business interruption have been asserted by businesses in the New York and Pentagon areas and by businesses located far away from ground zero and the prohibited zones of lower Manhattan. The losses and insurance claims arising from September 11 encompass a broad array of elements. After the attacks in New York, Washington, and Pennsylvania, the Federal Aviation Administration shut down the country’s commercial airports, leaving stranded passengers, including tourists and people traveling on business. In New York, civil authority was imposed until September 17, 2001. Each of the prohibited zones in the WTC area had their own level of allowable activity. As a result of the damaged and contaminated commercial and residential buildings in the areas surrounding the WTC, businesses needed alternative office space and people lost their jobs. There was an immediate drop in tourism.

Indeed, businesses throughout the nation that are dependent upon tourism and travel lost income, just as did those located in the WTC and its environs. These businesses have made claims on their property policies to seek recovery of their lost profits. The typical claimant is a hotel in a tourist locale such as Hawaii or Las Vegas that relies on travelers who arrive by airplane. With the grounding of all airplanes and the closure of all air

ports, hotels had an immediate decrease in occupancy and loss of income.

Some unique business interruption claims include those asserted by lessees in response to various aspects of being relocated, including the way relocation to a new space was handled by a landlord, the cleanup efforts in the damaged prior space, and rental obligations.

4) Covered property...

5) Caused by a "covered cause of loss."

With a hotel or a restaurant located in an airport, one can easily determine that there is a loss of income and a suspension of operations. These properties, however, were not directly physically damaged. Thus, the primary issue for remote facilities and busi-

nesses is whether the WTC and the Pentagon can be deemed "covered property" as described in the policy of the insured hotel or restaurant. Traditionally, damaged property at a remote, unrelated site in most instances is not covered property.

planes were again flying. There are, however, certain unique versions of business interruption coverages that could apply to losses caused by the shutdown of the nation's commercial airports and airlines. An example is insurance coverage for contingent business interruption. The ISO Contingent Business Interruption form

**B**y ruling in *Travelers* that the term "occurrence" was ambiguous, and in denying summary judgment for the Silverstein Parties, the court has set the stage for the factual issues to be developed, from which it can then determine the intent of the parties as it interprets and applies the insurance contracts at issue.

These claims and others have caused insurers and insureds to examine their coverages for business interruption and the imposition of civil authority with renewed interest. The language in the Insurance Services Office, Inc. (ISO) Business Interruption coverage form illustrates the typical business interruption coverage in insuring agreements:

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at the premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of the site at which the described premises are located.<sup>39</sup>

Thus, the coverage requires the following elements:

- 1) Actual loss of income.
- 2) Suspension of operations.
- 3) Direct physical loss to...

nesses is whether the WTC and the Pentagon can be deemed "covered property" as described in the policy of the insured hotel or restaurant. Traditionally, damaged property at a remote, unrelated site in most instances is not covered property.

Courts have addressed the issue of direct physical loss in several instances with differing results. In one case, the court rejected an attempt by a hotel to recover lost revenues when a restaurant that was adjacent to the hotel was destroyed.<sup>40</sup> Significantly, the hotel was undamaged. In that case, the court found that the damage must be to the covered property of the insured in order for the business interruption coverage to be triggered.

However, at least one court found coverage in a case in which there was an unquestioned danger of direct physical loss to covered property, which required the insured to vacate the premises.<sup>41</sup> The court equated damages with risk and therefore the danger of direct physical loss was covered. So there may be some wiggle room in a policy and the analysis of what the policy covers. Insureds are likely to argue that, for example, at the time of the airport shutdown there was a risk of direct physical loss to covered property. Note, however, that the airports were only closed for several days after September 11. This argument would not appear to succeed once the airports were opened and

provides:

This policy covers only against loss resulting directly from necessary interruption of business conducted on premises occupied by the Insured, caused by damage to or destruction of any of the real or personal property described above and referred to as CONTRIBUTING PROPERTY (IES) and which is not operated by the Insured, by the peril(s) insured against during the term of this policy, which wholly or partially prevents the delivery of materials to the Insured or to others for the account of the Insured and results directly in a necessary interruption of the Insured's business.<sup>42</sup>

Thus, if a hotel in Las Vegas needed supplies from a business located in a building that incurred direct physical loss due to the events of September 11, coverage could be found under this endorsement. Given the potential for terrorist attacks in the future, and the interconnection of businesses, it would be wise for insureds and their brokers to become familiar with types of business interruption coverages that extend beyond the basic business interruption form.

### Civil Authority

In order to recover loss of income, insureds have also looked to their coverage for the

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imposition of civil authority. The ISO Civil Authority coverage form provides in pertinent part:

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property other than at the described premises, caused by or resulting from any Covered Cause of Loss.

The coverage for Business Income will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins.

The coverage for Extra Expense will begin immediately after the time of that action and will end:

- (1) 3 consecutive weeks after the time of that action; or
- (2) When your Business Income coverage ends; whichever is later.<sup>43</sup>

At first blush, this coverage would seem to apply to the income loss due to the shutdown of the commercial airports. However, under the requirements of the coverage, the civil authority must prohibit access to the insured's premises, not merely render access to the insured's premises inconvenient or difficult. For example, in a case stemming from the Los Angeles riots in 1992, the establishment of a curfew by civil authorities did not prevent access to the insured's theaters following the riots and therefore coverage was not triggered.<sup>44</sup>

The requirement that the civil authority deny direct access to the insured's property is in accord with an opinion of the Wisconsin Supreme Court.<sup>45</sup> In that case, civil disturbances in Milwaukee in 1967 resulted in a curfew imposed on the city. There was no physical damage to the insured's property. The Wisconsin Supreme Court reviewed and adopted the analysis of the District of Columbia Court of Appeals that a requirement for civil authority coverage is that access to the insured's property be prohibited due to damage or destruction to the insured's property.<sup>46</sup>

On similar facts, however, the Michigan Court of Appeals arrived at the opposite result.<sup>47</sup> Riots in the city of Detroit in 1967 resulted in a curfew for the entire city. The insureds owned and operated movie theaters in the city, and the theaters were not physically damaged by the riots. Nevertheless, they incurred a significant decrease in patronage with an accompanying loss of income. The court found that the insureds' had a reasonable expectation that if the peril occurred for which the insurance provided protection,

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coverage for business interruption was available irrespective of any physical damage to the covered property. Significantly, the civil authority clause of the policy did not state that there was a necessity for direct physical damage.

The issue of whether coverage can be found under the civil authority coverage without physical damage to covered property is now before the U.S. District Court for the Eastern District of Louisiana in a September 11 case.<sup>48</sup> A hotel is seeking to invoke its civil authority coverage due to the loss of business because of the issuance of the order to shut down all commercial airports in the United States. The insurer rejected the claim of the hotel because of the lack of physical damage to the airports. It will be instructive to see if the court requires direct physical loss as a condition for coverage.

A civil authority order was in effect near ground zero for several days after the September 11 attacks, with prohibited and restricted access zones limiting pedestrian and motor vehicle traffic. Some policies have time limitations for their civil authority coverage, so the coverage may apply only after a certain number of days, which will limit recoverable amounts.

As September 11 claims and suits are adjudicated, judges, juries, and lawyers will be required to address issues under previously unthinkable circumstances. These issues will be resolved based on a combination of unique factual situations and contractual terms. The outcome of the insurance claims and litigation arising from September 11 will affect the manner in which the corporate community and the insurance industry manage their exposures and calculate the financial risks that they are willing to assume in the future. ■

<sup>1</sup> World Trade Ctr. Props. v. ACE Bermuda Ins., Ltd. and XL Ins., Ltd., 01 CV 9731 (dismissed, Mar. 25, 2002).  
<sup>2</sup> SR Int'l Bus. Ins. Co., Ltd. v. World Trade Ctr. Props., 01 CV 9291 (S.D. N.Y., filed Oct. 22, 2001) (JSM); World Trade Ctr. Props. v. The Travelers Indem. Co., 01 CV 12738 (S.D. N.Y., filed Dec. 28, 2001) (JSM); ACE Bermuda Ins. Ltd. and XL Ins. Ltd., 01 CV 9731 (dismissed). Copies of court filings in the WTC suits and other suits related to September 11, as well as articles and other items regarding terrorism, can be found on the Federation of Defense & Corporate Counsel (FDCC) Web site, available at <http://www.thefederation.org> (begin search at Terrorism Ins. Guide).  
<sup>3</sup> See generally the New York City Office of Emergency Management Prohibited Zone Maps, listing by date those areas of lower Manhattan where pedestrian and auto access was (or remains) either prohibited or limited, available at [http://www.nyc.gov/html/oem/html/other/restricted\\_zones/frozen\\_zone\\_history\\_pdf\\_page.html](http://www.nyc.gov/html/oem/html/other/restricted_zones/frozen_zone_history_pdf_page.html).  
<sup>4</sup> See, e.g., 730 Bienville Partners v. Assurance Co. of Am., U.S.D.C. E.D. La. No. 02-0206 (Dec. 11, 2001).  
<sup>5</sup> SR Int'l Bus. Ins. Co., Ltd., 01 CV 9291.  
<sup>6</sup> Zurich Ins. v. Westfield Am., Inc., 01 CV 9898 (S.D.

N.Y., filed Nov. 8, 2001); ACE Bermuda Ins. Ltd. and XL Ins. Ltd., 01 CV 9731 (dismissed); The Travelers Indem. Co., 01 CV 12738; Combined Ins. v. Certain Underwriters at Lloyds, 01 CV 10023 (S.D. N.Y., filed Nov. 13, 2001).  
<sup>7</sup> SR Int'l Bus. Ins. Co. Ltd., 01 CV 9291, Complaint ¶25.  
<sup>8</sup> *Id.*, Complaint ¶26.  
<sup>9</sup> The Travelers Indem. Co., 01 CV 12738, Complaint ¶23 and Exhibits A and B to Complaint (coverage charts); ACE Bermuda Ins., Ltd. and XL Ins., Ltd., 01 CV 9731, Complaint ¶¶29-30 (dismissed).  
<sup>10</sup> SR Int'l Bus. Ins. Co. Ltd., 01 CV 9291, Complaint ¶28.  
<sup>11</sup> The Travelers Indem. Co., 01 CV 12738, Complaint ¶5; SR Int'l Bus. Ins. Co. Ltd., 01 CV 9291, Complaint ¶28.  
<sup>12</sup> The Travelers Indem. Co., 01 CV 12738, Complaint ¶5 and Silverstein's Summary Judgment Motion, at 4-5.  
<sup>13</sup> SR Int'l Bus. Ins. Co. Ltd., 01 CV 9291, Complaint ¶29.  
<sup>14</sup> *Id.*, Complaint ¶30.  
<sup>15</sup> *Id.*, Complaint ¶¶30 and 31.  
<sup>16</sup> *Id.*, Complaint ¶31. (This occurrence issue involves property insurance only, not general liability or airline liability insurance—under the airline insurance, there is a separate occurrence for each plane).  
<sup>17</sup> *Id.*, Complaint ¶31.  
<sup>18</sup> World Trade Ctr. Props. v. The Travelers Indem. Co., 01 CV 12738 (S.D. N.Y., filed Dec. 28, 2001), Complaint ¶27.  
<sup>19</sup> *Id.*, Complaint ¶28.  
<sup>20</sup> *Id.*, Complaint ¶26.  
<sup>21</sup> *Id.*, Complaint ¶¶24 and 27.  
<sup>22</sup> SR Int'l Bus. Ins. Co. Ltd. v. World Trade Ctr. Props., 01 CV 9291 (S.D. N.Y., filed Oct. 22, 2001) (JSM).  
<sup>23</sup> *Id.*, Complaint ¶2.  
<sup>24</sup> *Id.*  
<sup>25</sup> *Id.*, Complaint ¶33.  
<sup>26</sup> *Id.*, Complaint ¶34.  
<sup>27</sup> See the FDCC Web site, available at <http://www.thefederation.org> (begin search at Terrorism Ins. Guide).  
<sup>28</sup> World Trade Ctr. Props. v. The Travelers Indem. Co., 01 CV 12738 (S.D. N.Y., filed Dec. 28, 2001) (JSM), Opinion & Order Denying Plaintiffs' Motion for Summary Judgment, at 9 (June 3, 2002) (citing WWW Assocs. v. Gianconteri, 77 N.Y. 2d 157, 162 (1990)).  
<sup>29</sup> *Id.*  
<sup>30</sup> *Id.* at 10.  
<sup>31</sup> *Id.* at 8, 13-14.  
<sup>32</sup> EEOT Energy Corp. v. Storebrand Int'l Ins. Co., 45 Cal. App. 4th 562, 572 (1996), *rev. denied* (Aug. 14, 1996).  
<sup>33</sup> *Id.* at 574.  
<sup>34</sup> *Id.* at 575.  
<sup>35</sup> PECO Energy Co. v. Boden, 64 F. 3d 852 (3d Cir. 1995).  
<sup>36</sup> *Id.* at 855, 856.  
<sup>37</sup> EEOT Energy Corp., 45 Cal. App. 4th at 576.  
<sup>38</sup> Lexington Ins. Co. v. The Travelers Indem. Co., 21 Fed. Appx. 585, 2001 WL 1132677 (9th Cir. 2001).  
<sup>39</sup> ISO form CP 00 30 10 00.  
<sup>40</sup> Ramada Inn Ramogreen, Inc. v. The Travelers Indem. Co., 835 F. 2d 812 (11th Cir. 1988).  
<sup>41</sup> Hampton Foods, Inc. v. Aetna Cas. & Surety Co., 787 F. 2d 349 (8th Cir. 1986).  
<sup>42</sup> ISO form 15 30 05/77.  
<sup>43</sup> ISO form CP 00 30.  
<sup>44</sup> Syufy Enters. v. Home Ins. Co. of Ind., 1995 WL 129229, 1995 U.S. Dist. LEXIS 3771 (N.D. Cal. 1995).  
<sup>45</sup> Adelman Laundry and Cleaners, Inc. v. Factory Laundry Ass'n, 59 Wis. 2d 145, 207 N.W. 2d 646 (1973).  
<sup>46</sup> Two Caesars Corp. v. Jefferson Ins. Co., 280 A. 2d 305 (1971).  
<sup>47</sup> Sloan v. Phoenix of Hartford Ins. Co., 46 Mich. App. 46, 207 N.W. 2d 434 (1973).  
<sup>48</sup> 730 Bienville Partners v. Assurance Co. of Am., U.S. D.C. E.D. La. No. 02-0206 (Dec. 11, 2001).

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